



[4910-13]

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 121

Docket No. FAA-2011-0045

Proposed Legal Interpretation

AGENCY: Federal Aviation Administration (FAA)

ACTION: Proposed interpretation

SUMMARY: The FAA is considering clarifying prior legal interpretations regarding pilot in command discretion under 14 C.F.R. §§ 121.547 (a)(3) and (a)(4).

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER.]

ADDRESSES: You may send comments identified by Docket Number FAA-2011-0045 using any of the following methods:

Federal eRulemaking Portal: Go to [http:// www.regulations.gov](http://www.regulations.gov) and follow the online instructions for sending your comments electronically.

Mail: Send comments to Docket Operations, M-30; U.S. Department of Transportation, 1200 New Jersey Avenue, SE, Room W12-140, West Building Ground Floor, Washington, DC 20590-0001.

Hand Delivery or Courier: Bring comments to Docket Operations in Room W12-140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Fax: Fax comments to Docket Operations at 202-493-2251.

FOR FURTHER INFORMATION CONTACT: Sara Mikolop, Attorney, Regulations Division, Office of the Chief Counsel, Federal Aviation Administration, 800 Independence Avenue, SW, Washington, D.C. 20591; telephone: 202-267-3073.

SUPPLEMENTARY INFORMATION:

On May 12, 2010, the FAA received a request for a legal interpretation from the Independent Pilots Association (IPA) regarding the consequences of deadhead transportation in connection with flight time limitations for flag operations, and the conditions for admission to an aircraft flight deck found in 14 C.F.R. § 121.547 and the United Parcel Service Flight Operations Manual (UPS FOM). We propose a three-part response to IPA's inquiry. First, we will address the issues regarding deadhead transportation. Second, we will address the issues regarding admission to the flight deck, in which we propose to clarify prior interpretations regarding pilot in command discretion under 14 C.F.R. §§ 121.547(a)(3) and (a)(4). Third, we will address the issues regarding certain provisions in the UPS FOM regarding admission to the flight deck.

I. Deadhead Transportation¹

An individual is considered to be in deadhead transportation when an employing air carrier requires that individual to ride as a passenger to a location at which he or she will serve as a flightcrew member or from a location at which the individual was relieved from duty as a flightcrew member to return to his home station.² See 14 C.F.R.

¹ We assume for purposes of this proposed legal interpretation that all operations are conducted under the flag operating rules. Thus, the analysis of flight time limitations in this proposed legal interpretation is limited to the current applicable flight time limitations found in subpart R of part 121.

² 14 C.F.R. § 121.471(f) (flight time limitations applicable to domestic operations) provides a description of deadhead transportation which is used in the same context throughout the part 121 regulatory framework for domestic, flag and supplemental flight time limitations. Section 121.471(f) states, "Time spent in transportation, not local in character, that a certificate holder requires of a flight crewmember and provides

§ 121.471(f); Legal Interpretation from Donald P. Byrne to James W. Johnson (May 9, 2003). In order to qualify as deadhead transportation, the transportation (1) cannot be local in character, (2) must be required of the flightcrew member by the air carrier and, (3) must be arranged by the air carrier. *See* Legal Interpretation 1992-48. Assuming that all three of these qualifiers are met, an individual assigned by a certificate holder to a flight, without being assigned to any duties during that flight, will be considered to be in deadhead transportation. We caution, however, that deadhead transportation is not considered part of a flightcrew member's rest period under any of the regulations governing flight time limitations. *See* 14 C.F.R. §§ 121.471(f), 121.491 and 121.519.

Although time spent in deadhead transportation is not included as part of a flightcrew member's rest, it is also not included in calculations of flight time limitations for a flightcrew member engaged in flag operations. Flight time limitations for flightcrew members in flag operations are found in subpart R of part 121. Subpart R, places limits on the amount of time an individual may act or may be scheduled to act as a flightcrew member for an air carrier. For purposes of determining compliance with the flight time limitations in subpart R, flight time calculations are based on total block-to-block time. *See* Legal Interpretation 1997-20; Legal Interpretation 1990-27 (stating that the language in § 121.483(a), "no carrier may schedule a pilot to fly...", prescribes a block-to-block limitation); Legal Interpretation 1989-1 (distinguishing "scheduled to fly" from the term, "flight deck duty" (used in subpart S) which means work as a flightcrew member on the flight deck).

to transport the crewmember to an airport at which he is to serve on a flight as a crewmember, or from an airport at which he was relieved from duty to return to his home station, is not considered part of a rest period."

These flight time limitations can only be violated when an individual acts or is scheduled to act as a flightcrew member for an air carrier. Thus, the time during which one is assigned to deadhead transportation does not count towards flight time limits because, in order to be assigned to deadhead transportation, one cannot also be assigned to a flight as a flightcrew member. However, we must caution that if a person in deadhead transportation performs duty during the course of the flight as a pilot, flight engineer, or flight navigator, that person becomes a flightcrew member. *See* 14 C.F.R. § 1.1 (defining a flightcrew member as “[A] pilot, flight engineer, or flight navigator assigned to duty in an aircraft during flight time.”). As such, the total block-to-block time for the flight will accrue towards the flight time limitations found in subpart R.

II. Admission to the Flight Deck

IPA’s request for interpretation raises two broad issues related to the application of § 121.547(a) which identifies the individuals who may be admitted to the flight deck of an aircraft operating under part 121 and the conditions for such admission.³ The first

³ Section 121.547(a) states:

- (a) No person may admit any person to the flight deck of an aircraft unless the person being admitted is --
 - (1) A crewmember;
 - (2) An FAA air carrier inspector, a DOD commercial air carrier evaluator, or an authorized representative of the National Transportation Safety Board, who is performing official duties;
 - (3) Any person who --
 - (i) Has permission of the pilot in command, an appropriate management official of the part 119 certificate holder, and the Administrator; and
 - (ii) Is an employee of --
 - (A) The United States; or
 - (B) A part 119 certificate holder and whose duties are such that admission to the flightdeck is necessary or advantageous for safe operation; or
 - (C) An aeronautical enterprise certificated by the Administrator and whose duties are such that admission to the flightdeck is necessary or advantageous for safe operation.
 - (4) Any person who has the permission of the pilot in command, an appropriate management official of the part 119 certificate holder and the Administrator. Paragraph (a)(2) of this section does not limit the emergency authority of the pilot in command to exclude any person from the flight deck in the interests of safety.

issue we will address involves the identification of the appropriate provision within § 121.547(a) by which crewmembers and individuals in deadhead transportation may be admitted to the aircraft flight deck. The second issue we will address involves the exercise of pilot in command (PIC) discretion regarding the admission of certain individuals to the flight deck.

Regarding the first issue raised by IPA, crewmembers may be admitted to the flight deck pursuant to § 121.547(a)(1) and individuals in deadhead transportation may be admitted to the flight deck pursuant to §§ 121.547(a)(3) or (a)(4). The regulation plainly states that only crewmembers may be admitted to the flight deck of an aircraft under the authority of § 121.547(a)(1). As discussed earlier in this proposed legal interpretation, an individual assigned to a flight as a crewmember cannot, at the same time, be assigned to deadhead transportation. Thus an individual assigned to deadhead transportation may not be admitted to the flight deck under § 121.547(a)(1).

An individual in deadhead transportation may, however, be admitted to the flight deck under 14 C.F.R. §§ 121.547(a)(3) or (a)(4). Section 121.547(a)(3) allows flight deck access for employees of certain entities, including employees of part 119 certificate holders, whose presence on the flight deck is necessary or advantageous for safe operation. Thus, this provision could be used to allow persons in deadhead transportation access to the flight deck. Section 121.547(a)(4) is more general than § 121.547(a)(3) in that it applies to “any person.”

The second broad issue raised by IPA involves the PIC’s exercise of discretion regarding flight deck admission under § 121.547(a). This issue has been discussed in prior legal interpretations examining the PIC’s overall safety responsibility, as well as the

implication of the PIC prior permission requirements that appear in §§ 121.547(a)(3) and (a)(4) but not in (a)(1) or (a)(2).

Individuals who may be admitted to the flight deck under §§ 121.547(a)(1) and (a)(2) (i.e., crewmembers, FAA inspectors, Department of Defense Commercial air carrier evaluators and certain National Transportation Safety Board representatives) serve a presumed safety role and as such, are not subject to the same prerequisites for admission as those individuals identified in §§ 121.547(a)(3) and (a)(4). In contrast with §§ 121.547(a)(1) and (a)(2), admission to the flight deck under either §§ 121.547(a)(3) or (a)(4) requires prior permission from the PIC, the FAA Administrator and an appropriate management official of the certificate holder. In promulgating §§ 121.547(a)(3) and (a)(4), the FAA has recognized a legitimate need to allow individuals who do not fall within §§ 121.547(a)(1) and (a)(2) onto the flight deck. The FAA has also recognized that this need for flight deck access does not arise out of a presumed safety need. Accordingly, the PIC has greater latitude to deny an individual access to the flight deck under §§ 121.547 (a)(3) and (a)(4).

In prior legal interpretations, we stated that the PIC permission provision provides the PIC unfettered discretion whether to admit certain individuals to the flight deck under a §§ 121.547(a)(3) or (a)(4) situation. *See* Legal Interpretation from Joseph A. Conte to Brigitte Lakah (December 16, 2002); Legal Interpretation 2001-7. *But see* Legal Interpretation 2003-1 (distinguishing a “pure” §§ 121.547(a)(3) or (a)(4) situation as the only time the PIC has unfettered discretion and stating that a “pure” §§ 121.547(a)(3) or (a)(4) situation does not exist when an individual’s presence on the flight deck is required by another rule (e.g., § 121.550 regarding secret service agents)). We based

these interpretations on the rationale that a PIC's safety authority would be undermined if his or her decision to deny permission for certain people to enter the flight deck in a §§ 121.547 (a)(3) or (a)(4) situation was challenged by his or her employer. *See* Legal Interpretation 2003-1 (indicating that post flight disciplinary proceedings taken by an air carrier in a pure §§ 121.547(a)(3) or (a)(4) situation interferes with the duties and responsibilities required of a PIC by regulation); Legal Interpretation from Joseph A. Conte to Brigitte Lakah (December 16, 2002) (stating that second-guessing a PIC's decision to deny permission for certain people to enter the flight deck would undermine "[T]he safety underpinning for having a 'PIC-permission-provision' in the regulations."); Legal Interpretation 2001-7.

The PIC bears the responsibility for the safety of the passengers, crew, cargo and aircraft during flight. *See* 14 C.F.R. §§ 91.3 and 121.535(e)-(f). To that end, it continues to be the PIC's decision as to whether there is a safety-related reason for excluding from the flight deck an individual eligible for admission under §§ 121.547(a)(3) or (a)(4). *See e.g.* Legal Interpretation 2001-7 (identifying numerous potential reasons for denying admission to the flight deck in a §§ 121.547(a)(3) or (a)(4) situation such as rough weather, distraction to flightcrew, a complex operation requiring heightened attention by the flightcrew, all of which are safety-related).

However, to the extent that prior legal interpretations state or simply imply that air carriers have no ability to question a PIC in their employ regarding his or her decision to deny flight deck access to an individual for a reason that is not based on a safety concern, we believe the agency overstated its position. Accordingly, we propose to rescind the relevant portions of those prior legal interpretations. The FAA believes that

at an appropriate time and venue, air carriers must be able to question why a PIC decided to exclude certain individuals from the flight deck when there was no apparent safety issue.

While, as we have stated above, the PIC is responsible for the safety of the passengers, crew, cargo and aircraft during flight, we also hold air carriers responsible for the safe conduct of all aspects of their operations. *See generally* 14 C.F.R. part 121. But, limiting air carriers' ability to manage their workforce, when there is no apparent risk to aviation safety, is outside the scope of the agency's safety oversight responsibilities.

The FAA's interest is in promoting safety and as such, we would be concerned with any action by the carrier that could reasonably impact the ability of the PIC to exercise his or her authority to make a determination that access to the flight deck needs to be denied for the safety of the operation. To that end, the agency presumption in any investigation will be that the PIC acted appropriately. The FAA expects, however, that the PIC will be able to articulate a safety-related reason for denying access to the flight deck in situations subject to §§ 121.547(a)(3) and (a)(4).

III. United Parcel Service Flight Operations Manual

The United Parcel Service Flight Operations Manual (UPS FOM) provides for the UPS implementation of § 121.547(a). *See* UPS FOM, Administration, Jumpseat Policies and Procedures, 02-04, Priority Descriptions (Rev No: 40, Rev Date: 08/31/10). The UPS FOM includes a list that describes numerous categories of potential jumpseat occupants and provides a priority order for their carriage. *See id.* The categories of potential jumpseat occupants include potential crewmembers and individuals in deadhead

transportation. *See id.* The UPS FOM identifies as “Priority 3A” jumpseat occupants, “UPS crewmembers who have been provided a commercial ticket for a deadhead, but elect to travel via the Company jumpseats instead...” *See id.* The UPS FOM identifies, “U.S. Government couriers (U.S. Government employees only), Loadmasters, UPS Maintenance and Flight Operations personnel...(Note)” as priority 3 jumpseat occupants. The “Note” referred to in the priority 3 description further explains the priority 3 jumpseat occupants as follows:

NOTE: Priority 3 UPS crewmember flight deck occupants are important to UPS flight operations. These priority 3 flight deck occupants are UPS-assigned other crewmembers and these on-duty crewmembers will assist the operating crew at the direction of the Captain during normal and emergency operations. These duties enhance the security and safety of the flight operation; thus, these crewmembers gain admission to the flight deck under FAR 121.547 (a)(1). As a result, the Captain’s discretion, regarding these other crewmembers, is not unfettered. The exclusion of these crewmembers from the flight deck requires that the Captain has a compelling explanation, which is valid only if an emergency situation exists whereby the presence of these crewmembers is not in the interests of aviation safety.

See id. Based on the note associated with the description of individuals identified for priority 3 status by the UPS FOM, it appears that UPS intends for loadmasters and UPS maintenance and flight operations personnel to be assigned to perform duties during

flight and therefore meet the definition of crewmembers. It is possible that these individuals meet the definition of “crewmember” if they are “assigned to perform duty in an aircraft during flight time.” *See* 14 C.F.R. § 1.1. *See e.g.* Legal Interpretation 1986-12 (stating that if a mechanic employee of an air carrier is assigned duty during flight time, then the mechanic is a “crewmember” and may ride in the jumpseat pursuant to § 121.547(a)(1)). It is also possible that some individuals could meet the definition of flightcrew member depending on their airman qualifications and the type of duty assigned, thus triggering the flight time limitations in Subpart R.⁴ For purposes of evaluating compliance with § 121.547(a), the priority descriptions in the UPS FOM are not determinative. A determination as to whether a jumpseat occupant meets the definition of crewmember or flightcrew member for a particular operation would have to be made on a case-by-case basis because the language in the UPS FOM does not provide sufficient detail to make a blanket determination. If a particular jumpseat occupant meets the definition of flightcrew member or crewmember then this individual would gain admission to the flight deck under § 121.547(a)(1). If it is determined that a particular individual seeking admission to the flight deck has been assigned to the flight for purposes of deadhead transportation, with the intent that he or she travel primarily as a passenger, then this individual may gain access to the flight deck with the approvals described in §§ 121.547(a)(3) or (a)(4).

⁴ 14 C.F.R. § 121.385(a) provides the regulatory framework for required crewmembers. It states, “No certificate holder may operate an airplane with less than the minimum flight crew in the airworthiness certificate or the Airplane Flight Manual (AFM) approved for that type airplane and required by this part for the kind of operation being conducted.” To the extent that a certificate holder assigns a deadheading individual, flightcrew member or crewmember to a particular operation and that individual is not required for the operation by the aircraft type certificate, operating regulations or AFM, the FAA would not view that individual as a “required crewmember” for purposes of compliance with 14 C.F.R. § 121.385(a).

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